86-2052

IN THE

Supreme Court of The United States

MARCH TERM, 1987

No. _____

JOHN BERRYHILL
Petitioner,
v.

THE STATE OF TEXAS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS STATE OF TEXAS

JOHN D. BERRYHILL
PRO SE

P.O. Box 3689
Austin, Texas 78704
(512) 478-1635

PRESS OF E.W. ALPHAGRAPHICS, PRINTSHOPS OF THE FUTURE, AUSTIN, TEXAS

QUESTIONS PRESENTED

I. The trial court erred in admitting evidence of prior extraneous offenses. To allow the admissibility of inherently unreliable and highly prejudicial evidence effectively denied the Appelant his Constitutional rights of due process and equal protection under the law.

II. Appellant, his counsel, and the 2nd and 5th Courts of Appeal in Fort Worth and Dallas agree in holding Article 38.071 of the Texas Code of Criminal Procedure to be unconstitutional, because of violating the Appellant's V, VI, and XIVth Amendement rights. This case is one of importance and which has potential impact upon the way the courts are protecting the accused's right to confront the witnesses against him in cases concerned with sexual abuse of children.

III. Appellant believes the Court of Criminal Appeals has decided an important question of state and federal law in conflict with the applicable decisions of two Court of Appeal Courts in Texas, which has not totally been, but should be, totally settled by the United States Supreme Court.

SUBJECT INDEX

INDEX OF AUTHORITIES

RULES, STATUTES, AND MISCELLANEOUS:

IN THE

Supreme Court of The United States

MARCH TERM, 1987

No. _____

JOHN BERRYHILL
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS STATE OF TEXAS

Appellant, JOHN BERRYHILL, urges this court to issue a Writ of Certiorari to review the decision of the Court of Criminal Appeals of Texas rendered on November 26th, 1986.

OPINIONS BELOW

The Court of Criminal Appeals did not publish it's opinion, but affirmed the judgment of the trial court on November 26, 1986.

Appelant's motion for rehearing was denied on January 21, 1987, without opinion.

JURISDICTION

This court's jurisdiction is invoked under Section §2101 (c) Title 28, *United States Code*. The Motion for rehearing filed by the Appellant was rejected by the Court of Criminal Appeals for Texas on January 21, 1987. This petition is being filed less than sixty days after that date, and is therefore, timely. Supreme Court Rule 20 (1); 28 U.S.C. (2101) (a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, to the United States Constitution provides in part as follows:

No person shall be compelled in any criminal case to be a witness against himself.

Amendment VI, to the United States Constitution provides in part as follows:

In all criminal prosecutions, the accused shall enjoy the right to be confronted with the Witnesses against him.

Amendment XIV, Section 1, to the United States Constitution provides in part as follows:

No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF FACTS

The Appellant was charged with the felony offense of aggravated sexual abuse of a child by indictment in Travis County, Texas. Appellant pled "not guilty" and was tried before a jury which found him guilty of aggravated sexual abuse of a child and assessed a punishment of fifteen (15) years in the Texas Department of Corrections. On October 9th, 1985 the Court of Appeals issued it's opinion upholding the judgment of conviction. No motion for rehearing was filed. On November 26, 1986, Appellant's motion for descretionary review was denied by the Court of Criminal Appeals of Texas.

The evidence at the trial showed that an adult eyewitness observed Appellant sucking on the penis of a handicapped child who had been placed under the Appellant's care. This witness presented evidence in response to her questions to the Appellant upon discovering the alleged act. (R.III46-48), (R.III48).

Another witness testified that after the offense, Appellant admitted that he had done something twice before with the victim,

(R.III65-66). This statement was admitted over Appellant's timely objection. The objection was based in part on the grounds that the statement represented proof of an extraneous offense. The Appellant did not testify or offer any evidence or actively cross examine this adult eyewitness.

The trial court also admitted video taped testimony, over Appellant's objection that the video tape violated the Appellant's right to face the witness against him which was guaranteed to him under the United States Constitution Amendments V, VI and XIV.

REASONS FOR GRANTING WRIT

Because the Court of Criminal Appeals affirmed the trial courts judgment without opinion, Appellant must speculate as to the basis for the affirmance. The importance of the case, however, merits a concise restatement of the Appellants basic contentions in the Court of Criminal Appeals:

1. *The admission of testimony concerning unadjudicated extraneous offenses was clearly reversible error.* Where defendant did not testify and did not mislead the jury or create a false impression, the trial court's abuse of descretion allowing this vague and remote evidence of extraneous offenses had an overwhelming prejudicial effect in comparison to its small probative value. Other means of

proof (an adult eyewitness to the act itself) and other facts appropriate for making decisions of this kind were available. (R.III-5-14). Analogy should be made to the Federal Rules of Evidence Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.) and Federal Rules of Evidence Rule 402 (Irrelevant Evidence inadmissable.) See *United States v. Clesneros* 491 F2nd 1068 (U.S. Ct.App. 5th Cir.)

2. *The improper admission of extraneous offenses resulted in the denial of due process and equal protection under the United States Constitution.* To separate this type of offense from any other criminal offense in Texas or elsewhere and allow the admissibility of inherently vague, unreliable, and highly prejucidial evidence would, in this case and any other similar case, have the effect of denying the Appellant, and any other criminal defendant similarly situated, his Constitutional rights of due process and equal protection under the law.

3. *Trial counsel for Appellant timely objected to the admission of this evidence as being irrelevant to any issues in the case.* This admission was: prior to any rebuttal or defensive issues being raise by the defense in the case; not Res Gestae of the offense: so unclear and insufficiently proved that it did not meet the necessary remoteness standards; not within any exception to the prohibition of the trial of extraneous offenses or collateral matters (the inherent unreliability

inferred from the act itself. Putting the trial court and Court of Appeals in direct conflict with the Court of Criminal Appeals. See *Boutwell V. State of Texas* 719 S.W. 2nd 164 (Tex. App. Houston 1985).

5. *The Appellant maintained, and still maintains, that none of the other exceptions or reasons for admission of extraneous offenses apply to this case.* Because of the clear, unequivocable, unimpeached and uncontroverted testimony of an adult eyewitness to the alleged act by the Appellant, no issue exists in the Appellants case as to the probability of the act and no reason or justification for using extraneous evidence to prove that the act probably occurred is necessary or justifiable. None of the other reasons or exceptions for allowing the admission of extraneous offenses in the trial of a criminal case, such as the need to prove identity, motive, malice, plan, system, flight or the need to rebut a defensive theory or the issue of Res Gestae apply to the Appellant's case. The instruction to the jury limiting their consideration to the questions of Appellant's intent was reversible error, since the evidence was inadmissible on the issue of intent.

6. *The admission of this evidence of extraneous offenses of the Appellant clearly became an issue and was prejudicial at the punishment phase of the trial.* When counsel for the State raised it in final argument by saying: "Remember that it happened more than one

time. In fact it happened three times." (R. IV-116), the jury's hostility toward the accused was magnified by this evidence and argument and it adversely affected the accused during the deliberations on the punishment that the Appellant should recieve. The trial court should have excluded the extraneous offenses on the basis of those considerations set forth in Federal Rules of Evidence Rule 403, i.e., prejudice, confusion or waste of time.

7. *The trial court's admission of the video taped testimony, even without the audio portion, violated the Appellant's Constitutional rights protected under the United States Constitution, V, VI, XIV Amendments.* Two Courts of Appeal in Texas have ruled the 1983 statute Article 38.071 to be unconstitutional. *Long v. State of Texas* 694 S.W.2d 185,186 (Tex. App. Dallas 1985, no pet.), *Powell v. State of Texas*, 694 S.W. 2d 416 (Tex. App. Dallas 1985, no pet.), *Buckner v. State of Texas*, 719 S.W. 2d 644 (Tex. App. Ft. Worth 1986), *Romines v. State of Texas* 717 S.W. 2d 745 (Tex. App. Ft. Worth). A Houston Court of Appeals has found it facially constitutional, but incorrectly applied in this case, *Lawson v. State of Texas* 697 S.W. 2d 803,806 (Tex. App. Houston, 1st Dist. 1985, no pet.). The Dallas court relied primarily on federal constitutional law to support both holdings.

8. *Article 38.071 is faced with the federal question, in the special case of a child victim witness, if it meets the confrontation*

clause standards of evidence reliability in regard to opportunity for direct and cross-examination of witness testimony. The defendant's right to be confronted by the witness against him is of paramount importance. The opportunity to call the witness during the defense's case is not equivalent to the right of confrontation, the statute forces a compulsion of an election between two constitutional right and is unconstitutional. *McDaniel v. Paty*, 435 U.S. 618,626 (1978); *Shapiro v. Thompson*, 394 U.S. 618,631 (1969); *Sherbert v. Verner* 374 U.S. 398,406 (1963); *Speiser v. Randall* 357 U.S. 513,518 (1958).

9. *Appellant contends that it was error to admit the video tape into evidence because it denied him the right to cofrontation*. The Appellant does not contend that the video tape of the victim, admited in evidence against him, fails to meet any of these statutory requirements. The primary function or purpose of the protective right of confrontation is to insure that one accused of a crime will not be tried on evidence of ex parte statements. *California v. Green* 339 U.S. 149,156 (1970). In *Mattox v. United States*, 156 U.S. 237,242 (1985) this court found the VIth Amendment right of the accused to confront the witness against him is a fundamental right and it is made obligatory on the states by the XIVth Amendment, emphasizing that the clause demands full in court testimony whenever possible in order to guarantee the opportunity for cross examination.

10. *Section 2 of Article 38.071 gives the defendant an opportunity to call the witness during the defendant's case, but is not equivalent to the right of confrontation.* An essential element of the confrontation clause is the ability to consult with one's lawyer during the cross-examination of the adverse witness, which is denied under Section 2. Sections 3 and 4 do not specifically create a technical system for the defendant and his counsel to converse. The 6th Amendment grants the defendant the right to personally participate in his defense. Section 4 is unconstitutional because it permits the child testimony outside the presence of the defendant, and Section 5 is likewise void because it doesn't require the child to appear in court after the video taped testimony, but only to be available to testify.

11. *The United States Supreme Court has already ruled on the purpose of the confrontation clause. Ohio v. Roberts 448 U.S. 56 (1980), Pointer v. Texas, 380 U.S. 400 (1965), and Snyder v. Mass. 291 U.S. 97 (1934).*

12. *The United States Supreme Court has already established certain guidelines that, by analogy, would be applicable in determining whether the facts of a given case justified use of the procedures set forth in Section 4. Globe Newspaper Co. v. Superior Court for Norfolk County 457 U.S. 596 (1982).*

13. *This child was declared incompetent to testify, but the trial*

court allowed the video tape of the child anyway. This court stated in *Wheeler v. U.S.* 159 U.S. 523 (1895), that in determining the child's competency as a witness, the child's capacity, intelligence, ability to tell the difference between the truth and a lie, and a sense of obligation to be truthful should be considered. This child, has cerebral palsy, is mentally retarded, and is deaf. Clearly the physical traits and condition of the child were not relevant issues to the offense but resulted in evidence that was prejudicially harmful, in comparison to its probative value.

The Court of Criminal Appeals affirmed the trial court's judgment pursuant to it's local Rule 21, without a published opinion. Appellant, thus, has no way of knowing the Court of Criminal Appeals' reasoning in rendering its decision.

PRAYER

Accordingly, for all the foregoing reasons, Appellant urges this court to grant a Writ of Certiorari in this case to review the decision of the Court of Criminal Appeals.

Respectfully
submitted,

JOHN D. BERRYHILL
PRO SE

P.O. Box 3689
Austin, Texas 78704
(512) 479-1635

APPENDIX

TABLE OF CONTENTS

APPENDIX

ARTICLE 38.071 TEXAS CODE OF CRIMINAL PROCEDURE

TESTIMONY OF CHILD WHO IS VICTIM OF OFFENSE

Sec. 1. This article applies only to a proceeding in the prosecution of an offense, including but not limited to an offense under Chapter 21, Penal Code, as amended, or Section 43.25, Penal Code, as amended, alleged to have been committed against a child 12 years of age or younger, and applies only to the statements or testimony of that child.

Sec. 2. (a) The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:

(1) no attorney for either party was present when the statement was made;

(2) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(3) the recording equipment was capable of making an accurate recording, the operator of the equipment was competent, and the recording is accurate and has not been altered;

(4) the statement was not made in response to questioning calculated to lead the child to make a particular statement;

(5) every voice on the recording is identified;

(6) the person conducting the interview of the child in the record ing is present at the proceeding and available to testify or be cross-examined by either party;

(7) the defendant or the attorney for the defendant is affored an opportunity to view the recording before it is offered into evi dence; and

(8) the child is available to testify.

(b) If the electronic recording of the oral statement of a child is admitted into evidence under this section, either party may call the child to testify, and the opposing party may cross-examine the child.

Sec. 3. The court may, on the motion of the attorney for any party, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state,

presence would contribute to the welfare and the well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

Sec. 4. The court may, on the motion of the attorney for any party, order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding. Only those persons permitted to be present at the taking of the child's testimony, and the persons operating the equipment shall be confined from the child's sight and hearing as provided by Section 3. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. The court shall also ensure that:

(1) the recording is both visual and aural and is recorded on film or videotape or by other electronic means;

(2) the recording equipment was capable of making an accurate

recording, the operator was competent, and the recording is accurate and is not altered;

(3) each voice on the recording is identified; and

(4) each party is affored an opportunity to view the recording before it is shown in the courtroom.

Sec. 5. If the court orders the testimony of a child to be taken under Section 3 or 4 of this article, the child may not be required to testify in court at the proceeding for which the testimony was taken. (Acts 1983, 68th Leg., p 3828, ch. 599, § 1m eff, Aug 29, 1983)

CLERK'S OFFICE
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 1248-85 styled:

JOHN D. BERRYHILL	·	Appellant
VS.		
STATE OF TEXAS		State

On December 4, 1985 the Appellant's Petition for Discretionary Review of the judgment of the Court of Appeals for the Third Supreme Judicial District of Texas was filed with this Court. On November 26, 1986 the Appellant's Petition for Discretionary Review was refused and on January 21, 1987 the Appellant's Motion for Rehearing was denied.

THEREFORE, WITH THE Denial of the Appellant's Motion for Rehearing on Petition for Discretionary Review, this cause was disposed of by this Court on January 21, 1987, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at my office in Austin, Texas, this the 4th. day of May, A.D., 1987.

THOMAS LOWE, Clerk of the
Court of Criminal Appeals
of Texas

IN THE COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 3-84-216-CR

JOHN D. BERRYHILL,

APPELLANT

vs.

THE STATE OF TEXAS,

APPELLEE

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. 73,359, HONORABLE JON N. WISSER, JUDGE

John D. Berryhill seeks to set aside a judgment of conviction for aggravated sexual abuse of a child rendered by the district court of Travis County. The jury assessed punishment of confinement for fifteen years. This Court will affirm the judgment of conviction.

Berryhill worked at the Texas School for the Deaf as a "houseparent." As a houseparent, he supervised handicapped and deaf children residing at one of the School's facilities in Austin. Berryhill, with three other houseparents, was responsible for the care and supervision of twenty children living in a "cottage" at the School.

Gail Wilson, Berryhill's supervisor, on May 3, 1983, saw Berryhill performing fellatio on a twelve year old boy, John L__. The child was deaf and affected with cerebral palsy.

Wilson immediately reported the incident to her superior, Phillip Darce. Darce went to Berryhill's room and requested him to accompany him back to Darce's office. Darce testified, over objection, to the following conversation:

> Q. Did Mr. Berryhill say anything to you about his prior contact with John L___?
>
> A. Yes, when I asked.
>
> Q. What did he say?
>
> A. Well, I asked Mr. Berryhill if he had had any sexual involvement or sexual encounters with students before this incident. He said, "Yes, twice before with John L___." I questioned him further to find out if there were any other students, because my concern was students who might need counseling help, and I explained that to him. And he stated that, no, that I -- that he was telling the truth, that those were the only other two incidents and only with those students -- with that student.

By his first ground of error, Berryhill asserts his major contention that the above-quoted testimony constituted evidence of extraneous offenses which was improperly admitted. The ground of error will be overruled.

Extraneous transactions constituting offenses shown to have been committed by the accused may become admissible upon a showing by the prosecution that the transaction is relevant to a material issue in the case; and, the relevancy value of the evidence outweighs its inflammatory or prejudicial potential. Murphy v. State, 587 S.W.2d 718 (Tex. Cr. App. 1979).

Berryhill points out that the State's eyewitness evidence of his commission of the offense was clear, unequivocable and unimpeached. Accordingly, Berryhill urges that there was no need of evidence of the extraneous offenses to prove that indeed he committed the offense. Cf. Albrecht v. State, 486 S.W.2d 97 (Tex. Cr. App. 1972). Further, Berryhill asserts that because the offense was witnessed by an adult, there was no need to admit evidence of prior incidents as commonly is done in

sexual offense prosecutions involving children in order to overcome the inherent problem of credibility of minor witnesses.

In prosecutions for sexual offenses, prior or subsequent sexual acts between the same parties are admissible to show the probability of the offense charged. The Court of Criminal Appeals has quoted with approval the following statement from 2 McCormack & Ray, Texas Law of Evidence § 1535 (3rd Ed. 1980):

> The sexual passion or desire of X for Y is relevant to show the probability that X did an act realizing that desire. On the principle set out above, this desire at the time in question may be evidenced by proof of its existence at a prior or subsequent time. Its existence at such other time may, of course, be shown by any conduct which is the natural expression of such desire. Thus, in prosecutions for adultery, incest, seduction, rape, and rape under age of consent, prior or subsequent acts of intercourse or other acts of familiarity between the parties are admissible to show the probability of the offense. The fact that the intercourse or other conduct is a separate criminal offense does not affect the admissibility of the evidence. (footnotes omitted).
>
> Brown v. State, 657 S.W.2d 117, 118 (Tex. Cr. App. 1983).

Accordingly, the district court did not err in admitting proof of Berryhill's prior sexual encounters with John L___.

In addition, this Court views as admissible Berryhill's prior sexual liaisons with John L___ to prove Berryhill's intent to arouse and gratify his own sexual desire. The indictment alleged that Berryhill engaged in the deviate sexual intercourse to arouse and gratify his own sexual desire. By pleading not guilty, Berryhill placed in issue that allegation as well as every other material allegation in the indictment.

It may not be concluded from the act of fellatio, itself, briefly witnessed by Gail Wilson, that Berryhill was arousing and gratifying his own sexual desire. John L___ was lying naked on a bed with Berryhill, fully clothed, performing fellatio on him. Berryhill made remorseful statements to his superiors that he knew the act to be wrong, that he was sorry,

and that he would not do it again.

The evidence of Berryhill's two prior sexual encounters with the same victim, coupled with his declarations that he knew those acts were wrong, constituted proof showing that his continuing attentions to the victim, despite knowledge that such attentions were wrong, were prompted by his desire for his own sexual gratification. Lewis v. State, 676 S.W.2d 136 (Tex. Cr. App. 1984).

By ground of error number two, Berryhill complains of the following instruction limiting consideration of extraneous offenses to the issue of intent:

> The defendant is on trial solely on the charge contained in the indictment. The State has introduced in evidence transactions other than the one charged in the indictment in this case, and with reference to those other transactions you are instructed that said evidence was admitted only for the purpose of showing intent, if it does.

Berryhill argues, as he did in ground of error one, that because intent can be inferred from the act itself, "intent was never placed into issue in this case and it was unnecessary, inflammatory, prejudicial and totally inappropriate and illegal for the State or Court to comment further as to evidence of a matter not at issue." Having concluded that the question of intent to gratify sexual desire was at issue and such extraneous offenses were properly introduced on such, this Court views the instruction as proper. See Hitchcock v. State, 612 S.W.2d 930 (Tex. Cr. App. 1981).

Over Berryhill's objection, the jury was permitted to view a videotape of approximately three minutes in length. The tape depicted the victim sitting with a policeman and several counselors from the School for the Deaf. The audio portion of the tape was turned off so that the jury could not hear any conversation between the policeman and counselors. By ground of

error number three, Berryhill claims the district court erred in admitting the videotape. He complains:

1. The tape had no probative value or relevancy to any contested issue, but instead was only inflammatory and prejudicial.

2. The court failed to instruct the jury not to consider the "audio" portion because even though there was no sound and the jury could not hear the audio portion, the members of the jury could "see" the testimony on the tape.

Admissibility of photographs is governed on the same basis as other types of evidence. A photograph is a graphic portrayal of oral testimony. If the verbal description is admissible, then a photograph is also admissible. Welch v. State, 576 S.W.2d 638 (Tex. Cr. App. 1979); Martin v. State, 475 S.W.2d 265 (Tex. Cr. App. 1972). A videotape film should be treated no different from other photographic evidence. See 2 Ray, Texas Law of Evidence § 1466 (3rd ed. 1980). Because the State had the right to place the victim before the jury, a visual depiction was admissible.

With respect to the limiting instruction, appellant failed to request such or object to the omission of such an instruction in the charge. Accordingly, any error was waived. Manry v. State, 621 S.W.2d 619 (Tex. Cr. App. 1981); Grady v. State, 614 S.W.2d 830 (Tex. Cr. App. 1981).

By his fourth ground of error, Berryhill complains of the following question by the prosecution on cross examination during the punishment phase of the trial:

> If you are released on probation, how do we and our children protect ourselves from you?

Although the district court sustained Berryhill's objection to the question as being inflammatory and irrelevant, it denied counsel's motion to strike and request for mistrial. Because

Berryhill failed to request an instruction to disregard, he cannot complain that the offending question was of such character as to make it impossible for the jury to withdraw the impression produced on their minds.

By his fifth ground of error, Berryhill claims that the district court erred in failing to quash the indictment because it is defective in two respects. The indictment provides that Berryhill:

> did then and there with intent to arouse and gratify the sexual desire of the said John D. Berryhill, knowingly and intentionally engage in deviate sexual intercourse with John L___, a child younger than fourteen (14) years of age and not his spouse, by then and there placing his mouth in contact with the genitals of the said John L___.

At the time of the offense, the statute provided:

> **§ 21.10. Sexual Abuse of a Child**
>
> (a) A person commits an offense if, with intent to arouse or gratify the sexual desire of any person, he engages in deviate sexual intercourse with a child, not his spouse, whether the child is of the same or opposite sex, and the child is younger than 17 years.
>
> Tex. Pen. Code Ann. § 21.10 (1972, superseded).

It is apparent that not only did the State allege the specific intent to gratify the sexual desire, but also alleged the culpable mental state of "knowingly and intentionally" with respect to "engage in deviate sexual intercourse."

Berryhill argues first that the indictment fails to allege a criminal offense under the laws of Texas and that it provides for a lesser mental state than required. We disagree. The indictment properly alleges the specific intent to arouse or gratify the sexual desire of any person.

Berryhill's second complaint of the indictment is that the pronoun "his" is used twice in such a manner that the person referred to is not clearly identified. Accordingly, he suggests

that "his mouth" could refer to the victim, so that the indictment alleges that the victim's mouth was in contact with the victim's own genitals. The argument is totally without merit.

The indictment is sufficient as it charges aggravated sexual abuse in ordinary and concise language so as to enable a person of common understanding to know what is meant. Tex. Code Cr. P. Ann. art. 21.11 (1966).

By his sixth and final ground, Berryhill claims that the charge, which tracked the language of the indictment, was defective because it contained the erroneous inclusion of "knowingly and intentionally" and the problematic pronoun "his." Because Berryhill did not object to the charge on this basis, any error was waived.

The judgment of conviction is affirmed.

Bob Shannon, Chief Justice

[Before Chief Justice Shannon, Justices Brady and Gammage]
Affirmed
Filed: October 9, 1985
[Not Published]